

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTOPHER CHARLES RATLIFF,

Defendant-Appellant.

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UNPUBLISHED

March 18, 2003

No. 237501

Oakland Circuit Court

LC No. 00-174072-FH

Before: Hoekstra, P.J., and Smolenski and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of possession of twenty-five or more, but less than fifty, grams of heroin, MCL 333.7403(2)(a)(iv). He was sentenced to nine months in jail and appeals as of right. We affirm.

Officer Main and his partner, Officer Locricchio, stopped a car with two occupants based on traffic violations. Officer Main saw defendant, the occupant of the front passenger seat, make “a stuffing motion into the seat cushion off to his left, with his left hand.” When he looked through the window of the car while both occupants were still in the car, he saw part of a pill bottle in the opening where he had seen defendant make the motion with his hand, which was “between the left-side of the seat cushion and the console.” Officer Locricchio testified that he saw the driver of the car reach with his right hand “over to where the passenger’s seat was,” and returned his hand back to his waistband. Officer Locricchio also stated that he saw an open bottle of gin in the car and that, as a result, he arrested the driver for having open intoxicants. As the driver of the vehicle was placed under arrest, a pill bottle that contained twenty-one packets of heroin fell out of the driver’s waistband.

In the first trial, the jury was selected, but not yet sworn, when the prosecution learned of the unavailability of Officer Locricchio due to a family emergency. The prosecutor requested dismissal of the jury and selection of a new jury when the witness was available. The trial court noted that the officer would be available the next day for testimony and denied the request. Officer Locricchio testified the next day during trial and was subjected to cross-examination. Neither party requested that the officer be excused from trial following his testimony. When trial resumed later that day, defense counsel insisted on calling the officer during his case in chief. Officer Locricchio could not return to court that day, but indicated that he would return on Monday. However, during the weekend, the officer was placed on leave from work due to a family emergency. Defense counsel refused to move for a mistrial, but requested a dismissal

with prejudice based on the unavailability of the witness. Defense counsel also stated that he was unavailable for continuation of trial when the officer's leave ended later that week. The trial court denied the motion to dismiss and ordered a mistrial. The trial court also denied defendant's motion to dismiss based on double jeopardy, finding that defendant had consented to the declaration of the mistrial based on the insistence that the witness be recalled to testify.

Defendant first alleges that his second trial violated the constitutional protection against double jeopardy because the trial court declared a mistrial during the first trial without manifest necessity or the consent of the parties. We disagree. The federal and state constitutional protections against double jeopardy<sup>1</sup> are not violated where a defendant consents to a mistrial and the mistrial is caused by innocent conduct on the part of the prosecutor or judge or by factors beyond their control. *People v Echavarria*, 233 Mich App 356, 362-363; 592 NW2d 737 (1999). A defendant, in effect, consents to a mistrial where "defense counsel clearly indicates an unwillingness to continue the trial, but refuses to acquiesce to a mistrial." *Id.* at 364-365. Retrial is permissible under double jeopardy principles because consent constitutes a waiver of a double jeopardy claim. *Id.* at 365. The trial court's factual findings are reviewed under the clearly erroneous standard. *People v Tracey*, 221 Mich App 321, 323; 561 NW2d 133 (1997).

The termination of the first trial was prompted by the failure of Officer Locricchio to return for further testimony as requested by the defense. Defense counsel at the first trial stated that he was "not gonna make a motion for mistrial," but was "gonna make a motion for the case to be dismissed." The trial court found that this request constituted a consent to a mistrial for double jeopardy purposes because defendant's motion for dismissal, under the circumstances, was effectively a request for a "species of mistrial." We cannot conclude that the trial court's factual finding was clearly erroneous. *Tracey*, *supra*. Furthermore, even assuming that defendant's motion to dismiss the case at the first trial would not in itself constitute consent to a mistrial, defense counsel otherwise manifested an unwillingness to continue. When the prosecutor informed the court that the officer was due to return to work later that week, defense counsel indicated that he could not be in court later in the week due to a vacation. This expressed unwillingness to continue constituted consent by the defense to the mistrial. *Echavarria*, *supra*. Thus, contrary to defendant's argument, his retrial did not violate the constitutional protections against double jeopardy.<sup>2</sup>

Defendant next alleges that insufficient evidence of possession or evidence that he aided and abetted the possession of the heroin was presented at trial to support his conviction. We disagree. In reviewing the sufficiency of the evidence to support a conviction, we view the evidence in a light most favorable to the prosecution to determine if any rational factfinder could have found the essential elements of the crime were proven beyond a reasonable doubt. *People v Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002). Possession of a controlled substance

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<sup>1</sup> US Const, Ams V, XIV, Const 1963, art I, § 15.

<sup>2</sup> A defendant's consent to a mistrial does not serve to allow retrial where the defendant was "goaded into consenting by intentional prosecutorial misconduct." *Tracey*, *supra* at 326. However, there is no allegation of prosecutorial misconduct. Additionally, in light of our conclusion regarding defendant's consent to the mistrial, we need not address the prosecutor's argument that the declaration of a mistrial was supported by manifest necessity.

encompasses dominion or right of control over the drug with knowledge of its presence and character. *People v Nunez*, 242 Mich App 610, 615; 619 NW2d 550 (2002). With regard to the requirement of knowledge of the presence and character of the illicit drug, minimal circumstantial evidence is sufficient to show a defendant's state of mind. See *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999).

Viewing the evidence in the light most favorable to the prosecution, there was sufficient evidence to support a finding that defendant possessed the heroin at issue with knowledge that it was heroin. *Hunter, supra*. Defendant was observed making a stuffing motion in the area near the seat of the car. A pill bottle was then observed in this area. The driver of the vehicle, with knowledge that the officer was about to search the passenger area, reached into that area of the seat and returned his hand to his waistband, and the pill bottle containing the heroin fell from the driver's waistband. This exercise of dominion over the pill bottle by defendant and the attempted concealment constituted circumstantial evidence of the knowledge requirement. *McRunels, supra*. Therefore, contrary to defendant's argument, there was sufficient evidence to support a finding that he possessed the heroin at issue with knowledge that it was heroin.

Affirmed.

/s/ Joel P. Hoekstra  
/s/ Michael R. Smolenski  
/s/ Karen M. Fort Hood